

FSW

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: April 12, 2005

Opposition No. **91152243**

CENTRAL MFG. CO.

v.

HEPA CORPORATION

Before Hairston, Walters and Bucher, Administrative
Trademark Judges.

By the Board:

This case now comes up on the following motions:

1. Opposer's combined motion (filed January 5, 2005 via certificate of mailing)¹ for reconsideration of the Board's order dated December 7, 2004 and to extend its time to respond to applicant's discovery requests;² and

¹ Opposer's combined motion bears a mail-room date stamp of January 24, 2005, the date the motion was received in the Office.

² Opposer's combined motion was filed after its time to respond to applicant's discovery requests had expired. Therefore, although styled (in part) as a "motion to extend," opposer's combined motion is technically a motion to reopen and for reconsideration. See Fed. R. Civ. P. 6(b); and TBMP § 509.01(b)(1)(2d ed. rev. 2004).

The Board further notes that opposer's "Notice to the Board," filed December 13, 2004 in support of its motion for summary judgment is moot, inasmuch as opposer's motion for summary judgment was denied on December 7, 2004.

2. Applicant's motion (filed January 18, 2005) for discovery sanctions.

Opposer's combined motion has been fully briefed. Opposer did not file a response to applicant's motion.³

Opposer's Request For Reconsideration

The Board's order of December 7, 2004, *inter alia*, denied opposer's request to amend its notice of opposition to change the goods in connection with which opposer asserts it has used its mark. Opposer contends that the Board erred in denying opposer's motion, arguing that applicant would not be prejudiced by the amendment.

Generally, the premise underlying a motion for reconsideration, modification or clarification under Trademark Rule 2.127(b) is that, based on the facts before it and the prevailing authorities, the Board erred in reaching the order or decision it issued. Such a motion may not properly be devoted simply to a reargument of the points presented in a brief on the original motion. See TBMP § 518 (2d ed. rev. 2004).

We find that opposer has merely reargued its position on reconsideration of the Board's order denying opposer's motion to amend. We further find no error in our ruling.

³ While opposer did not file a response to applicant's motion, we have exercised our discretion to consider the motion on its merits in light of the parties' briefing of opposer's combined request for reconsideration and motion to "extend" (technically a motion to reopen, see footnote 2).

Accordingly, opposer's request for reconsideration is hereby denied.⁴

Opposer's Motion to Reopen Its Time to Respond to Applicant's Discovery Requests

The showing that must be made to reopen a prescribed time under the Federal Rules of Civil Procedure is set forth at Rule 6(b), made applicable to Board proceedings by Trademark Rule 2.116(a), and provides for an enlargement of time after the expiration of the specified time period, "where the failure to act was the result of excusable neglect."

In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), as discussed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the Supreme Court clarified the meaning and scope of "excusable neglect," as used in the Federal Rules of Civil Procedure and elsewhere. The Court held that the determination of whether a party's neglect is excusable is:

at bottom an equitable one, taking account of all relevant circumstances surrounding the

⁴ Opposer also requests reconsideration of the Board's order granting it six days additional discovery. While technically that part of opposer's motion is one to reopen its discovery period, rather than to reconsider the original ruling, the distinction is immaterial. Opposer's motion to reopen its discovery period is denied as moot in light of the rulings made herein, see *infra*, with respect to opposer's motion to reopen its time to respond to applicant's discovery requests and applicant's motion for sanctions.

party's omission. These include. . . [1] the danger of prejudice to the [nonmovant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.

Pioneer, 507 U.S. at 395. In subsequent applications of this test, several courts have stated that the third *Pioneer* factor, namely the reason for the delay and whether it was within the reasonable control of the movant, might be considered the most important factor in a particular case. See *Pumpkin*, *supra* at footnote 7 and cases cited therein.

Turning first to the third (and most important) *Pioneer* factor, the reason for the delay and whether it was within opposer's control, opposer contends that a family emergency prevented its "representative," Leo Stoller, from responding to applicant's discovery requests within the time set by the Board. Opposer, in its brief, states:

"During the period in which the Opposer's response to Applicant's motion to compel was due, the representative of the Opposer, Leo Stoller's 85 year old mother had a heart attack.... Leo Stoller is his mother's primary care giver and was unable to respond to the Board's order of December 7, 2004 as a result of the medical condition of Leo Stoller's mother. Leo Stoller is presently engaged in the process of locating a long-term care facility for his mother who is now unable to care for herself."

Opposer's Motion for Reconsideration of Board Order Dated December 7, 2004 and Request for an Extension of Time,

p. 2.

Applicant argues that opposer's assertions lack "even cursory evidentiary showings" such as specific dates or details about Mr. Stoller's mother's condition. Specifically, applicant notes that none of opposer's statements have been authenticated. *Applicant's Opposition To Opposer's Motion For Reconsideration And Opposer's "Request" For An Extension Of Time*, p. 3.

While we are not unsympathetic to the demands a family emergency may put on individual family members, we agree with applicant that there is a total lack of specificity in the arguments presented in opposer's brief and discrepancies among the facts reported concerning the nature of the family emergency and the involved dates. A party moving to reopen its time to take required action "must set forth with particularity the detailed facts upon which its excusable neglect claim is based; mere conclusory statements are insufficient." TBMP § 509.01(b); see authorities cited in that section.

Significantly, this lack of specificity prevents us from knowing the direct impact on this proceeding of Mr. Stoller's family emergency during the critical weeks of December 2004. By December 15, 2004, the date opposer claims to have received the Board's December 7, 2004 order, Mr. Stoller was already aware that his mother's needs would require attention. Nonetheless, opposer did not contact

applicant's counsel to request applicant's consent to an extension, or file an unconsented request for more time with the Board. Opposer did not attempt even a partial response to applicant's interrogatories or document production requests, and when opposer did file its motion to reopen, any such responses were notably absent.

Further, Mr. Stoller's lack of candor regarding critical dates is disquieting. None of Mr. Stoller's claims have been verified by way of an affidavit or declaration. As was made explicit in our order dated October 10, 2003, the opposer herein is Central Mfg. Co., a Delaware corporation, and not Leo Stoller, an individual. A corporation cannot act on its own; it must operate through its agents. In the absence of a verified statement from a corporate officer or director, the record consists of Mr. Stoller's arguments only.

Accordingly, application of the third *Pioneer* factor weighs against a finding of excusable neglect.

The second *Pioneer* factor, the length of the delay and its potential impact on judicial proceedings, also favors applicant. Opposer has now been ordered to respond to applicant's discovery requests on three occasions, twice as a result of motions to compel filed by applicant. Most recently, on December 7, 2004, the Board ordered opposer to respond to applicant's discovery requests by December 27,

2004. Opposer's motion to reopen this term did not reach the Board until January 24, 2005, more than one month later. The delay in prosecution of this case has been detrimental to the orderly administration of the opposition process. See *Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 USPQ2d 1858, 1860 (TTAB 1998)(opposer's inattention to set schedule adversely impacted administration of case; opposer's motion to reopen the discovery and testimony periods denied); *Polyjohn Enterprises Corporation v. 1-800-Toilets, Inc.* 61 USPQ2d 1860 (TTAB 2002) ("calculation of the length of the delay in proceedings also must take into account the additional, unavoidable delay arising from the time required for briefing and deciding such motions;" petitioner's motion to reopen discovery denied). It is, after all, opposer who brought this action against the applicant three years ago, and in so doing, "took responsibility for moving forward on the established schedule." *Atlanta-Fulton, supra*, p. 1860.

As regards the remaining *Pioneer* factors, we find no specific prejudice to applicant and no specific evidence of a bad faith attempt by opposer to delay this case.

Having carefully applied the *Pioneer* factors to this case, we find that opposer's delay was not the result of excusable neglect. Accordingly, opposer's motion to reopen is denied.

Applicant's Motion for Sanctions

Applicant moves the Board for an order granting it discovery sanctions under Trademark Rule 2.120(g), on the ground that opposer has not complied with the Board's order directing it to respond to applicant's interrogatories and requests for production of documents.

Opposer filed late responses to applicant's discovery requests together with opposer's reply brief in support of its combined motion to reopen and for reconsideration. However, the Board has determined that opposer's failure to comply with the Board's December 7, 2004 order was not the result of excusable neglect, and has denied opposer's motion to reopen the time within which opposer may comply. In view thereof, opposer's late responses have not been considered or entered into the record in this case.

Accordingly, we hold that opposer has not complied with the Board's December 7, 2004 order; applicant's motion for discovery sanctions is hereby granted; judgment is hereby entered against opposer and the opposition is hereby dismissed with prejudice.⁵

-o0o-

⁵ Opposer is reminded of the strict requirements for filing any request for reconsideration of a Board order. See Trademark Rule 2.127(b) and Fed. R. Civ. P. 11.